

1 THE COURT: Please be seated. You can call the
2 case.

3 THE COURTROOM DEPUTY: Criminal cause for
4 sentencing, docket number 15-CR-284. United States versus
5 Love.

6 Please state your appearances.

7 MR. GILMAN: Good morning, Your Honor, Andrew Gilman
8 for the United States. With me at counsel table is Jared
9 Maneggio from the U.S. Probation Department, as well as an
10 intern from my office, Diane Hu.

11 MR. KIRCHHEIMER: Federal Defenders by Peter
12 Kirchheimer for Mr. Love. This is Mr. Love sitting next to
13 me.

14 Good morning, Judge.

15 THE COURT: Good morning to everyone.

16 Can I have the spelling of the last name of the
17 intern, please.

18 MS. HU: H-U.

19 THE COURT: Spell your first name, traditional
20 spelling D-I-A-N-E.

21 MS. HU: Yes, Your Honor.

22 THE COURT: And is there any objection to the
23 student intern sitting in at the sentencing?

24 MR. KIRCHHEIMER: No, Your Honor, there is not.

25 THE COURT: So a lot has happened since we were last

1 here, both in the area of Supreme Court case decisions and
2 Second Circuit case decisions and briefing in this case.

3 So I know when we were last here in October,
4 Mr. Love -- I know it's a lot to remember, it's kind of far
5 back to remember -- I had explained to you how we will
6 proceed, but I think given that most of your prior contact
7 with the justice system has been through the state court, I
8 would feel more comfortable just explaining to you again how
9 we're going to proceed and because I have received additional
10 submissions from counsel, I want to make sure that we're all
11 on the same page and that we have all the same submissions, so
12 I will go through that as well.

13 And the first thing I'm going to do, I'm going to
14 start with that, putting on the record everything that I've
15 received and considered for that reason to make sure that all
16 of us have copies of what's been submitted. And there were
17 still, of course, outstanding objections to the sentencing
18 guidelines in the presentence report.

19 I think in terms of anything else there were no
20 objections --

21 MR. KIRCHHEIMER: There were not, Judge.

22 THE COURT: -- I'm correct about that?

23 But the objections to the guideline range obviously
24 have to be resolved by the Court, that's part of the subject
25 of the additional briefing that we had and also part of the

1 subject of the additional case law that has emerged since we
2 were last here. And before I can impose sentence, as an
3 initial step I have to do my very best to calculate that
4 guideline range and hopefully get it right because that is a
5 first step. But the guidelines are advisory, they are not
6 binding on the Court.

7 The Court has to consider whether there are any
8 departures that are appropriate either within that advisory
9 guideline system or pursuant to Title 18 of the United States
0 Code Section 3553(a) in applying those factors that are in
1 that section, determining whether or not a variance from the
2 guidelines is appropriate. In other words, a sentence outside
3 of the guidelines is appropriate.

4 In that regard I'll give the attorneys an
5 opportunity to address the Court. You also have a right to
6 address the Court, if you wish to address the Court I will
7 give you an opportunity to do that, and then after we get
8 through all of that is when I will impose sentence.

9 Do you understand that procedure, Mr. Love?

0 THE DEFENDANT: Yes, ma'am.

1 THE COURT: All right. So we have, of course, the
2 presentence report which was prepared or disclosed on
3 September 9th, 2016. It also has a sentence recommendation
4 and of course that presentence report was prepared with the
5 sentence guideline manual that was in effect at the time and

1 appropriately so the guideline manual from 2015. I mention
2 that because we are going to have a lot discussion about which
3 guideline manual applies here.

4 There is the defendant's objections to the
5 presentence report dated September 14, 2016, the government's
6 letter of September 23rd, 2016 indicating no objections to the
7 presentence report. The government's response to defendant's
8 objections to the presentence report by letter dated
9 September 28, 2016. There is an addendum to the presentence
10 report issued by probation that was filed October 4th of 2016
11 and, in essence, probation disagreed with the objections to
12 the guideline range raised by defense counsel. And then there
13 was additional information that was provided to supplement the
14 presentence report about your own personal background, some of
15 it was verification of certain information including your
16 medical history documenting drug addiction and hospitalization
17 for that, also other medical issues, injuries that you have
18 sustained over time, and also mental health treatment that
19 you've had over time. Most of it occurred around 2008
20 according to that addendum.

21 There is the defendant's sentencing memorandum of
22 October 6 of 2016 and there were exhibits that were attached
23 which were the objections to the presentence report and some
24 photographs, I guess a video surveillance from the bank
25 robberies. There is the government's sentencing memorandum

1 dated October 17th.

2 I note that when we were here on October 24th the
3 Court accepted Mr. Love's guilty plea to the entire
4 indictment, Counts One, Two and Three.

5 There is the defendant's supplemental briefing from
6 March 15th, there was a brief letter, this is post-Beckels.
7 There is a more in-depth brief that was provided by the
8 defense dated March 27th and the March 15th letter is attached
9 as an exhibit, and then the government's responsive brief
10 dated April 12th of 2017.

11 So that's everything that I have received. Is that
12 everything I should have, Mr. Gilman?

13 MR. GILMAN: Yes, Your Honor.

14 THE COURT: Mr. Kirchheimer?

15 MR. KIRCHHEIMER: Yes, Judge.

16 THE COURT: And, Mr. Love, did you have an
17 opportunity to -- first of all, did you get a chance to see
18 these documents?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Did you get a chance to review them with
21 your attorney?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Do you understand the objections that
24 were made by your attorney? I know it's a bit complicated.

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: Aside from the objections that were
2 raised by your attorney, in connection with anything else
3 that's in the presentence report, especially anything
4 concerning your prior background, anything like that, is there
5 anything that you think still needs correcting?

6 THE DEFENDANT: No, ma'am.

7 THE COURT: So I have reviewed very carefully the
8 parties' submissions and of course additional case law and
9 unless there is something that's not covered in the papers
10 that the parties would like to address with me, I'm prepared
11 to rule on the objections that were made to the presentence
12 report.

13 MR. GILMAN: The government is happy to rest on the
14 papers at this time, Your Honor.

15 MR. KIRCHHEIMER: Only one.

16 THE COURT: Only one.

17 MR. KIRCHHEIMER: Only one suggestion, Judge, which
18 is that it's -- again, I keep forgetting the name of the case,
19 after -- in the early days post-Booker, Judge Newman wrote a
20 decision about the application of the advisory guidelines and
21 did say that if in cases where it was extraordinarily
22 complicated to resolve the guidelines issues and where the
23 guidelines weren't necessarily going to be followed, it was
24 not necessarily necessary to do so. And so I would suggest to
25 the Court that one manner of proceeding --

1 THE COURT: You're talking about a case prior to
2 *Dorvee*?

3 MR. KIRCHHEIMER: Oh, yes, Judge.

4 THE COURT: Like around 2006.

5 MR. KIRCHHEIMER: 2006 or '7. It starts with how
6 are we going to proceed in the Second Circuit with the
7 guideline cases, but the point is if it's not necessary to the
8 sentence and if it's too complicated, you don't have to
9 resolve the guidelines question.

10 My argument in -- if we lose on the career offender
11 issue, my argument will then be that even if he were to be a
12 career offender, the Court shouldn't apply the career offender
13 guidelines because of the nature of the history, even if it's
14 more legally applicable, it's inappropriate for him. So --

15 THE COURT: I don't think that any of the case law
16 that's happened that's been handed down in the intervening
17 period does away with the case law both from the circuit and
18 the Supreme Court that says where the Court has some
19 disagreement with either the policies embodied in the
20 guidelines or does not believe -- for example, with the crack
21 guidelines, which was *Gall* or *Dorvee* which was the child porn
22 guidelines where the Court believes that there is no empirical
23 data to support the policies that are embodied in that
24 guideline, that the Court can certainly depart from them under
25 a policy reason, but also the Court still has the obligation

1 under 3553(a) to consider all of those factors which still
2 include the policy considerations embodied in the guidelines
3 obviously, which are advisory, but that the Court can still
4 vary for any of the number of reasons that are listed in that
5 statute including the nature and circumstances of the offense,
6 which is a lot of the argument --

7 MR. KIRCHHEIMER: Right.

8 THE COURT: -- that you're making, and also the
9 history and characteristics of the defendant before the Court.
10 None of these cases really change that --

11 MR. KIRCHHEIMER: Absolutely, Judge. All --

12 THE COURT: -- and can change that procedure.

13 MR. KIRCHHEIMER: All I was suggesting was that if
14 you had decided ahead of time that you were going to find that
15 that guideline was too harsh for Mr. Love's conduct, that you
16 would not have to resolve the issue of the legal applicability
17 if you decided ahead of time that factually it wasn't
18 appropriate in this case. That's all. It's a way out.

19 THE COURT: I understand your point. I have some
20 reservations about that because, as you well know, right after
21 *Booker* was decided there was just a lot of guesswork going
22 around as to how *Booker* was actually going to be applied. And
23 I think the first case that really gave us some real guidance
24 within the circuit was Reena Raggi's opinion in *Jones* from
25 2006, that basically said this is the three-step process --

1 MR. KIRCHHEIMER: Right.

2 THE COURT: -- that you have to go through to do
3 that. But even since then, right, there has been a lot of
4 clarification, if you will, both from the circuit and from the
5 Supreme Court as to whether, for example, the guidelines are,
6 per se, reasonable. Obviously, they are not per se
7 reasonable. And whether the Court can, as I said before, have
8 policy disagreements with the guidelines and veer away from
9 the guidelines and vary.

10 And that's happened in a lot of areas also with
11 economic crimes, for example, not just child pornography, but
12 economic crimes. Always of course staying within the bounds
13 of what the statutory limits are whether there was a minimum
14 or a maximum sentence, usually there is a maximum sentence, so
15 always staying within the bounds of that.

16 So I'm a little loath to or reluctant -- loath is
17 maybe too strong a word, but reluctant to just toss out the
18 guidelines with the bath water and feel that nonetheless I
19 think the cases have consistently said that as a first step --
20 and that's *Gall*, right? You take that language from *Gall*,
21 that as initial matter, as a benchmark, the Court has to
22 calculate the guidelines and then you take off from there.
23 Whether you disagree or you want to vary or you want to
24 depart, then that's where the next part of the tough work --
25 because it's all tough work but that's where the next part of

1 the tough work really comes in.

2 MR. KIRCHHEIMER: Other than that suggestion, Judge,
3 I have nothing further to add to the legal argument about
4 whether the career offender guideline should apply or not.

5 THE COURT: Thank you. First of all, I do want to
6 thank both counsel for your very well drafted briefs, really
7 appreciate it. It's a tough issue and the fact that you all
8 took such care and took the time to extrapolate your views and
9 to provide authority for your various positions is greatly
10 appreciated by the Court.

11 So *Beckels* really changed things and as it's
12 acknowledged by the defense in the subsequent briefing,
13 post-*Beckels* in some ways -- and maybe this is too strong a
14 phrase -- sort of took the wind out of your sails as far as
15 the validity of residual clause. So we're sitting here at a
16 point in time where the guideline that's at issue is the
17 definition of the terms that are used in Section 4B1.1 of the
18 guidelines, and I'm referring specifically to guideline 4B1.2
19 of the guidelines which contained the definitions of the term
20 of the crime of -- of the term of crimes of violence, all
21 right. That's pertinent here in two ways. Because the
22 defense argument -- and feel free to interrupt me,
23 Mr. Kirchheimer, if I'm getting your argument wrong, there are
24 two arguments essentially that are put forth by the defense,
25 which is number one, that the bank robbery to which Mr. Love

1 pled guilty under 18 U.S.C. Section 2113(a) is not a crime of
2 violence. That's important because in order for the Court to
3 find, Mr. Love, that you are a career offender, the Court
4 first has to make a determination that the crime that you
5 committed is a crime of violence under the ACCA, under the
6 Armed Career Criminal Act. So that's one question that the
7 Court has to determine.

8 MR. GILMAN: Sorry, Your Honor.

9 THE COURT: Not ACCA, I'm sorry. But --

10 MR. KIRCHHEIMER: Yes.

11 THE COURT: -- under the pertinent guideline.

12 MR. KIRCHHEIMER: The Career Offender Guideline.

13 THE COURT: The Career Offender Guideline, I'm sorry
14 I misspoke. Thank you. Which again is 4B1.1.

15 So the second point is that your previous state
16 court convictions for robbery, you have several for robbery in
17 the third degree, robbery in the second degree, and I think an
18 attempted robbery in the second degree, also don't fall under
19 the definition of crimes of violence and, therefore, don't
20 support the career offender finding.

21 Do I have it in a nutshell?

22 MR. KIRCHHEIMER: Yes, Judge.

23 THE COURT: A lot of the earlier arguments stem from
24 the contention that the residual clause of the relevant
25 guideline was invalid given the Supreme Court's decision in

1 2010 in *United States versus Johnson*, reported at 559 U.S.
2 133, or *Johnson 1*. Then there was a second decision by the
3 Supreme Court, *Johnson 2* in 2015. The question of whether or
4 not the definition of violent crime was unconstitutionally
5 vague though had not been decided by either of those two
6 cases.

7 The Second Circuit had before it that issue or
8 related issue in U.S. versus *Corey Jones* and it vacated its
9 decision pending the Supreme Court's decision in *United States*
10 versus *Beckels*, which was just decided a month or two -- a
11 couple of months ago. Very recently, this year 2017.

12 The Supreme Court -- right, I'm sorry. So *Johnson 1*
13 addressed the force clause and *Johnson 2* addressed the
14 residual clause.

15 *Beckels* addressed the viability of the sentencing
16 guideline and its definition of violent crime. And in
17 summary, the Supreme Court held that that guideline was not
18 void for vagueness. So the guideline is still a valid
19 guideline. As such, to the extent that the defense has argued
20 that the application note to that guideline doesn't apply
21 because it's an invalid guideline, no longer holds water
22 because the Supreme Court has spoken and it has said that it
23 is a valid guideline and the application note applies. The
24 application note clarifies that certain enumerated offenses,
25 which include -- and it has a whole laundry list under

1 Application Note 1, includes the crime of robbery. To the
2 extent that the defense has posited an argument that an
3 ex-post facto application -- an inappropriate ex-post facto
4 application would occur if the Court applied the 2016
5 guideline manual which got rid of the residual clause in the
6 Career Offender Guideline and simply enumerated what are
7 considered crimes of violence no longer applies, because in
8 essence the 2014 guideline manual with the application note
9 results in the same definition.

10 MR. GILMAN: Your Honor, these crimes I think --
11 2014, I apologize, Your Honor.

12 THE COURT: The 2014, I have the 2014 guideline up
13 here and Application Note 1 says for purposes of this
14 guideline, crime of violence and controlled substance offenses
15 include the offenses of aiding and abetting, conspiring and
16 attempting to commit those such offenses. And then crimes of
17 violence includes murder, manslaughter, kidnapping, aggravated
18 assault, forceable sex offenses, robbery, arson, it has more
19 enumerated offenses. And it says, other offenses are included
20 as crimes of violence if, A, that offense has an element of
21 use, attempted use or threatened use of physical force against
22 the person of another, or B -- that doesn't apply. It talks
23 about the use of explosives.

24 MR. GILMAN: Thank you, Your Honor.

25 THE COURT: So in the argument with respect to the

1 ex-post facto result if the 2016 guidelines were applied, the
2 argument was that the 2014 guidelines manual would apply
3 because Mr. Love's crimes occurred in an early part of 2015,
4 so that would be the guideline manual that would be in effect
5 at the time the offense was committed. So that's why we're
6 talking about the 2014 guideline manual.

7 I'm just presenting in summary form the reasons for
8 the Court's decision today because, of course, at the time of
9 sentencing the Court is obligated to state its reasons on the
10 record, but the Court intends to file a written opinion to
11 more fully explain the decision. I'm sure you'll get a copy
12 of it, Mr. Love, okay.

13 THE DEFENDANT: Yes.

14 THE COURT: All right. So there being no ex-post
15 facto application by using -- or result by the Court using the
16 2015 guideline manual, that's the guideline manual that's in
17 effect today and that's the manual that the Court will use.

18 But the analysis doesn't stop there, right, because
19 there is still the argument as to whether or not bank robbery
20 is a crime of violence, because that's the first step in the
21 career offender finding. Notably, neither side cited to any
22 cases in that regard.

23 The Court found two cases that address this issue,
24 one is a summary order from the Second Circuit. The other is
25 a full decision. Both of them, notably -- it's odd all these

1 cases are named *Johnson*, but it's *Leonard Johnson* versus the
2 *United States*, it's a Second Circuit case decided February 25
3 of 2015, and that is cited at 779 F.3d 125. And there at
4 pages 128 to 129 the Court says the following -- and that was
5 in connection with a conviction for being a felon in
6 possession of a weapon as well as bank robbery. Using the
7 firearm during and in connection with a crime of violence.
8 And apparently there were several decisions that had been
9 rendered by the circuit in the history of this case. There
10 the Court held that among the crimes of violence that may
11 serve as a predicate for a Section 924(c) conviction, the
12 firearm conviction, are the bank robbery, which is the 2113
13 subdivision (a) robbery, and armed bank robbery offenses
14 charged against *Johnson* in Counts One and Two.

15 And then, notably, in the case against *Leonard*
16 *Johnson* he had gone to trial, the jury convicted him of all of
17 the charged offenses and on appeal the circuit vacated the
18 conviction for the unarmed bank robbery because they said it
19 was a lesser included offense of the armed bank robbery and so
20 it was a duplicate. In other words, that the jury voted for
21 the same crime twice in essence, so they vacated the simple
22 bank robbery. However, that didn't change their finding that
23 that bank robbery was a crime of violence.

24 And in another decision decided after *Johnson 2*,
25 after the Supreme Court decision in *Johnson 2*, this is a

1 summary decision, *United States versus Maslar*, M-A-S-L-A-R,
2 which can be found at 663 Federal Appendix 59. It was decided
3 October 5th, 2016. In that case the defendant, like you,
4 Mr. Love, pled guilty to bank robbery, let's call it simple
5 bank robbery under 18 U.S.C. Section 2113(a). And there too,
6 there was a challenge that was presented by the defendant to
7 the district court's findings that that bank robbery charged
8 was a crime of violence and the appellate court found that
9 there was no error in that finding. And there a lot of the
10 same arguments that are raised here were raised by the
11 defendant, and the Court said on page 61, we conclude that
12 *Maslar's* interpretations of the first clause of 18 U.S.C.
13 Section 2113(a), in arguing that a conviction under that
14 clause is not categorically, quote, a crime of violence, end
15 of quote, or at least subject to dispute if not altogether
16 unpersuasive. *Maslar* cites no authority that really supports
17 either of the interpretations of 18 U.S.C. Section 2113(a)
18 scope. And in that case -- and the provision includes no
19 language clearly indicating that a defendant can be convicted
20 if he used, quote, force and violence or intimidation, end of
21 quote, directed only at property or in the absence of intent,
22 as *Maslar* suggests. So the circuit has maintained that bank
23 robbery under 2113(a) is a crime of violence.

24 Then we address the second prong of the defense
25 objections to the presentence report which is whether or not

1 the crime of robbery under New York law is a violent crime.
2 And it seems to me that that is foreclosed now under the 2016
3 guideline because robbery is listed as an enumerated offense.
4 Notwithstanding that, it seems to this Court that any
5 arguments that are based on the Second Circuit's vacated
6 decision in *Corey Jones*, not only is it not persuasive, it
7 actually invites the Court to speculate as to what the Second
8 Circuit would do. Because the circuit expressly vacated that
9 decision to await the Supreme Court's decision in *Beckels*, so
10 we don't know how *Beckels* is going to influence the circuit's
11 decision in *Jones*.

12 That being said, the circuit has repeatedly stated
13 in all the cases that were cited by the government, and some
14 of those cases are as recent as 2015, where the circuit has
15 held that New York State robbery, including robbery 3, is a
16 violent crime. And I'm aware of my colleague, Brian Cogan's
17 decision in *U.S. versus Terence Johnson* where he has followed
18 some other courts that have, including some other judges of
19 this Court, who have found that robbery in the third degree or
20 robbery generally under New York law is not a crime of
21 violence. They all rely on these more than 20-year old cases
22 from the appellate division to the State of New York, and
23 again cites to all of these cases are going to be in my
24 opinion.

25 The government has cited to a more recent case from

1 the New York State Court of Appeals *People versus Jurgin*,
2 J-U-R-G-I-N, I believe is the spelling. And I have to wonder
3 whether that opinion from the New York State Court of Appeals
4 doesn't call into question some of those prior appellate
5 division cases and whether that Court would have struck down
6 those robbery convictions as not being proper robberies to
7 begin with. For example, the tapping, right, or the touching
8 might have been considered I think under the 2015 decision by
9 the New York State Court of Appeals, might have been
10 considered jostling, which is a misdemeanor.

11 But I also think some of these cases also miss the
12 point and I have to agree with some of the analysis by the
13 government, and certainly anyone who has grown up in a poor
14 neighborhood and has been the subject of any kind of robbery
15 or anywhere that you might have subjected it, it has to be a
16 frightening experience to be surrounded by a group of people
17 who are demanding your money and the only implication can be
18 is that if you don't give in that something terrible is going
19 to happen to you. And that the only reason that nothing
20 happened to you is because you gave in and handed over the
21 money, which is generally what the cops say you should do
22 anyway in the event of a robbery is not resist, to avoid the
23 use of physical force, I think defies the reality of the
24 situations. But I do think that there is some support even
25 under *Johnson* 1 and at least some of the explanation that the

1 Supreme Court gave or the description that they gave about
2 force. I think that there is some justification I think for
3 upholding the circuit's determination that has, to date, been
4 unaltered that robbery is a crime of violence.

5 I understand, as my colleague Judge Cogan explained
6 in *Terence Johnson*, that the circuits, many of those
7 decisions, if not all of them, were summary orders, but after
8 2007 the circuit nevertheless, while they said that they don't
9 have precedential value, nevertheless did permit their
10 citation. That means that there is some precedential value,
11 there is some persuasive value is one of the terms that we use
12 when it's not binding precedent, there is some persuasive
13 value and if I'm going to be persuaded by anybody I think I
14 would be more persuaded by the circuit than an appellate
15 decision.

16 So I find that robbery, at least as the law stands
17 now, robbery is a crime of violence. Again, that's an
18 alternate reason. I do find that under the 2015 -- excuse me,
19 the 2016 guideline manual because robbery is, at the minimum,
20 an enumerated offense, that the career offender -- that it is
21 a crime of violence applicable to the Career Offender
22 Guideline.

23 I am happy to accept your exception to my ruling.

24 MR. KIRCHHEIMER: Very briefly.

25 THE COURT: Yes.

1 MR. KIRCHHEIMER: Two discrete --

2 THE COURT: Again, this is going to be more
3 elaborated in the opinion, this is just summary and --

4 MR. KIRCHHEIMER: On the ex-post facto and solely
5 for preservation --

6 THE COURT: No, of course I understand.

7 MR. KIRCHHEIMER: On the ex-post facto issue
8 basically the flaw in the ex-post facto, as I understand it,
9 is that the Court is saying that because of the application
10 note in the 2014 guideline, the 2016 guideline doesn't change
11 the law. So that's basically a finding that the
12 application --

13 THE COURT: The net effect is that it doesn't change
14 it.

15 MR. KIRCHHEIMER: Right.

16 THE COURT: Because even in the concurrent strike of
17 Sotomayor, she says, well, then the application note
18 explains --

19 MR. KIRCHHEIMER: Right.

20 THE COURT: -- that, the clause.

21 MR. KIRCHHEIMER: So my answer to that is two fold.
22 Again, very briefly because we're just talking preservation.

23 My answer is that number one, the 2014 application
24 note is arguably says that robbery is -- they're not saying
25 it's an enumerated crime, because it was an enumerated crime,

1 that's an interpretation of the residual clause in 2014. The
2 residual clause being whatever it says, i.e., in the note a
3 robbery. So I would argue that that note has the same
4 residual clause flaw as -- that we've been talking about.

5 Now since we're talking a guideline issue and since
6 we're talking post-*Beckels*, my claim that that residual clause
7 doesn't apply is not the constitutional claim, but it is the
8 claim made in my last set of papers, that if you find that
9 that language is unintelligible, void for vagueness because
10 it's unintelligible for ACCA purposes, you can't use it for
11 statutory purposes either and you can't say that robbery is a
12 crime of violence in the 2014 version by virtue of it being a
13 residual clause because the residual clause is, in the words
14 of the Supreme Court, hopelessly -- suffers from hopeless
15 indeterminacy. So even if we are not arguing -- we're not
16 arguing with vagueness, you still can't rely on it for the
17 definition of robbery because -- in my words, it's
18 gobbledegook and so, therefore, it violates -- you can't set
19 the guideline based on something that's hopelessly
20 indeterminate.

21 THE COURT: That wasn't the holding of the Supreme
22 Court.

23 MR. KIRCHHEIMER: Right, no, I understand. No, I'm
24 not saying -- I'm saying my same statutory argument applies to
25 the use of the 2014 guideline --

1 THE COURT: I got it.

2 MR. KIRCHHEIMER: -- and, therefore, my argument is
3 that the 2016 guideline is a substantive change, contrary to
4 my client's interest and, therefore, it violates the ex-post
5 facto and therefore you can't do that.

6 Argument number two on the same point is that, even
7 if I'm wrong as to that part, taking the 2016 robbery or the
8 2014 application note robbery, neither one of them is -- they
9 just use the word "robbery" and neither one is a categorical
10 robbery basically in terms of common law what a robbery has to
11 mean, so, therefore, the same analysis of those appellate
12 division cases you don't like, applies to that concept of
13 robbery as well.

14 And while we're just on the one slight point --

15 THE COURT: I have to say just one thing because
16 having spent 23 years of my life in the state criminal justice
17 system as a prosecutor and then seven years as a judge and
18 doing appeals mind you, I have great difficulty with all these
19 arguments that say that robbery is not per se a crime of
20 violence at least in New York. What it may be in another
21 state, I can't speak to. But in New York. And the reason is
22 that New York State differentiated between the crime of
23 larceny, which is still a taking from the person, right?
24 They're still takings from a person, right? And the larceny
25 does not have any force or violence component, right? So as a

1 general matter, a pick-pocket is usually charged as a larceny,
2 it's not charged as a robbery. And like some of the cases
3 talk about, you know, a jostling which sometimes a pick-pocket
4 might entail, the bump in the subway, I don't know will a New
5 Yorker think that force is a bump in the subway, probably not,
6 but -- so then the New York State legislature made a separate
7 crime of robbery and they included in there the use of force,
8 the term force by itself presumes a level of violence. Are
9 there gradations of violence, absolutely. There are
10 gradations of violence. It also includes the threat of the
11 use of force, right? And the use of violence.

12 So I have great difficulty sort of wrapping my head
13 around any notion that the crime of robbery is per se not a
14 crime of violence, and maybe that's just me. There are
15 greater minds that, hopefully, will look at this and tell
16 me -- explain to me why I am wrong, but it seems to me that
17 you can't look at these crimes in a vacuum, right? Because
18 the legislature spoke and the legislature may differentiated
19 between the crime that is a taking of the person that doesn't
20 involve any force. And they've also included the crime of
21 extortion, right, which is another crime similar to the
22 federal crime where there might be some implied harm that will
23 come to a person in order to get them to give up the goods, so
24 to speak.

25 MR. KIRCHHEIMER: Very briefly to finish the last

1 preservation point on those two -- those three appellate
2 division cases finding that robbery wasn't necessarily a
3 violent crime under *the Johnson* 1 definition. I remind the
4 Court that that's not -- I mean, you know, I and my office
5 have been pushing that, but where we get it from is from the
6 language of *Corey Jones* and that part --

7 THE COURT: But *Corey Jones* does not exist.

8 MR. KIRCHHEIMER: Well, no, actually not --

9 THE COURT: That's a problem.

10 MR. KIRCHHEIMER: Actually not. We are currently --

11 THE COURT: It's in limbo.

12 MR. KIRCHHEIMER: We submitted, you know, we're --

13 THE COURT: No, I know it's been --

14 MR. KIRCHHEIMER: We submitted briefs and, in fact,
15 some of the language in my papers I confess came from our
16 second brief in *Jones*.

17 THE COURT: But you can't rely on the original --

18 MR. KIRCHHEIMER: But --

19 THE COURT: -- which can't even be found anywhere
20 because it was completely eliminated --

21 MR. KIRCHHEIMER: But the --

22 THE COURT: -- from the universe.

23 MR. KIRCHHEIMER: -- the reason, Judge -- forget
24 about the residual clause, which is what it was talking about
25 and which is now all gone, but the reasoning of the import of

1 those three appellate division cases is still, I would argue,
2 is still valid reasoning and we'll see what happens once our
3 next set of papers in *Corey Jones* --

4 THE COURT: I think -- and I haven't given the
5 government a chance to say anything, I don't know if you want
6 to throw anything in here.

7 MR. KIRCHHEIMER: Number one they're not supposed
8 to.

9 THE COURT: Is there anything that you would like to
10 say on behalf of the government?

11 MR. GILMAN: Your Honor, just very briefly. The
12 government is in agreement with the Court, in that there just
13 not exist -- there is not an ex-post facto violation here
14 because whether the Court considers either the current
15 guidelines, the 2016 guidelines, or the 2014 guidelines that
16 were in effect at the time of the crime, the result is the
17 same, in that New York State robbery qualifies as a crime of
18 violence categorically and also that the federal offense of
19 bank robbery under 2113(a) also qualifies as a crime of
20 violence.

21 THE COURT: So I think the one thing we can all
22 agree on is that we really do need some clear guidance from
23 somebody higher up than the district court as to how to apply
24 all of these definitions and it has to be something that
25 really comports with common sense and the reality of the world

1 I think, and you know, not taken in a vacuum and taking into
2 account at least in New York and obviously the circuit has to
3 consider the case law as a whole in front of the circuit and
4 its prior case law, but within the context of all of those
5 larceny type cases where -- I mean, I don't think anybody has
6 issue with the fact that murder or attempted murder is a crime
7 of violence or kidnapping or anything of that sort, assault,
8 anything of that sort. Where it comes in to is where you've
9 got this whole range of ways in which the crime of robbery can
10 be committed, right, range of ways in which larcenies can be
11 committed, range of ways in which extortion can be committed,
12 I think we do need to look at all of these different statutes
13 together to see what the intention is of the legislature, when
14 they pass these statutes what were they looking at, what was
15 their intent in order to come to a determination that this is
16 what it is, or adjust this categorical project. Something has
17 to give here and I think what is clear is that we need some
18 good guidance on this and I'm hopeful that we will get it in
19 the future whether it's the *Corey Jones* case or any other case
20 that comes up either before the circuit or before the Supreme
21 Court.

22 MR. KIRCHHEIMER: Again, very briefly my last point
23 in this area, it's sort of almost -- it's an illustrative
24 point rather than a legal point. As part of the first
25 argument that federal bank robbery is not necessarily a crime

1 of violence, I would remind the Court of the facts of this
2 case. Because if there ever was a suggestion that there isn't
3 violent physical force in the terms of *Johnson* 1 bank robbery.
4 In this case where my client goes up to the teller, presents a
5 note, which the government kindly gave us a copy of it which I
6 can hand up, saying this is an bank robber --

7 THE COURT: You can hand it up.

8 MR. KIRCHHEIMER: -- and nothing more. There's
9 no --

10 THE COURT: You have a copy of this I assume,
11 Mr. Gilman.

12 MR. GILMAN: Yes, Your Honor.

13 MR. KIRCHHEIMER: I got it from him.

14 I've also got -- I submitted my prior briefs in the
15 first brief the exhibits were a picture of my client --

16 THE COURT: Yes.

17 MR. KIRCHHEIMER: -- standing in line waiting to rob
18 the bank.

19 THE COURT: Keep in mind -- I understand that and
20 you made that argument in the papers and obviously that's an
21 argument you can make in mitigation, but keep in mind as well
22 that the circuit certainly is aware of the fact that included
23 in the 2113(a) bank robbery cases are cases where notes were
24 used, where no guns were used, no weapons were used, where
25 perhaps just like this, there is no explicit, like, I have a

1 gun, in reality he didn't have a gun, or I have a bomb and
2 they really don't have a bomb or it's a fake bomb or any of
3 that. I have to assume that the circuit is familiar with its
4 prior case law when it makes a statement that bank robbery
5 under 2113(a) is a crime of violence and there, too, you know,
6 perhaps some clarification is --

7 MR. KIRCHHEIMER: In terms of threat and
8 intimidation, the absolutely last point here, remember, there
9 are three counts, one completed bank robbery --

10 THE COURT: Two more attempts.

11 MR. KIRCHHEIMER: -- and the two attempts, and then
12 the two attempts. When the same thing happened, he handed up
13 the note, this is an bank robber and basically the tellers
14 laughed at him and he walked out. So in terms of assessing
15 the inherent threat of that note, at least again -- and it's
16 not -- I mean, they're supposed to be talking categorically, I
17 don't know how much this matters, but in those last two
18 attempts it didn't appear to intimidate anybody because they
19 just said forget about it and he walked out. So that is I
20 think --

21 THE COURT: But that's what makes it an attempt.

22 MR. KIRCHHEIMER: Yes. But it's the -- but in terms
23 of whether or not bank robbery is a categorically violent -- a
24 crime of violent -- violent physical force, I argue that you
25 have to remember -- and it includes this kind of bank robbery.

1 And I have to say before the guilty plea in this case I
2 included the Second Circuit note cases in my first brief,
3 *Lawrence* and *Henson*, where there were notes and the court said
4 a note was sufficient because of intimidation.

5 THE COURT: Right.

6 MR. KIRCHHEIMER: So that in taking the guilty plea
7 in this case I had to research whether this was sufficient --

8 THE COURT: That was sufficient.

9 MR. KIRCHHEIMER: -- to amount to a bank robbery,
10 and it. Is but that's why I find it extraordinarily ironic
11 that we're saying this is a violent crime when it was
12 committed in this manner when it was not.

13 THE COURT: Understood. Understood. Given the
14 Court's ruling the guideline ranges calculated by probation
15 applies and that provides a total offense level of 29.

16 Mr. Love, whether he's a career offender or not, has a
17 Criminal History Category VI, I think he had a total of 22
18 criminal history points and there is a sentence guideline
19 range of 151 to 188 months, and even though that had been
20 calculated under the 2015 guideline manual, nothing has
21 changed in that regard and the numbers are still the same. It
22 would have been the same in the 2014 manual as well.

23 So we get to that point, Mr. Love, where I give the
24 lawyers an opportunity to point out whatever factors they deem
25 are appropriate for the Court to consider in imposing

1 sentence. I'll start with the government and,
2 Mr. Kirchheimer, if there is anything you want to add, as I
3 said I thoroughly reviewed your submissions, but if there's
4 anything else you want to add besides what you said here today
5 already and in your brief, of course I'll hear from you.

6 Mr. Gilman.

7 MR. GILMAN: Thank you, Your Honor, just very
8 briefly. The government submits that a guidelines sentence on
9 Count One is appropriate here. That range being a sentence of
10 imprisonment from 151 to 188 months with any term of
11 imprisonment on Counts Two and Three to be served concurrently
12 with that sentence, guideline sentence on Count One.

13 The defendant --

14 THE COURT: Are you saying they should run
15 consecutively to Count One?

16 MR. GILMAN: Concurrently, Your Honor.

17 THE COURT: Concurrently. All counts to run
18 concurrently.

19 MR. GILMAN: Yes, Your Honor. And the defendant
20 does have an extensive criminal history, as Your Honor has
21 already recognized today. Previously, in fact Your Honor has
22 sentenced the defendant for robbery and thus there is -- the
23 defendant seems to be undeterred in many ways by sentences,
24 the kind he's received and today's sentence would be
25 substantially more than that and thus would provide adequate

1 deterrents under 3553(a) factors.

2 That said, Your Honor, the government recognizes
3 that the defendant's bank robbery here, while bank robbery is
4 a serious crime, the defendant's bank robbery is on the scope
5 of the less serious one could possibly commit in the bank
6 robbery context and that is why the government is taking the
7 position it is today that a guideline sentence on just one
8 count of conviction would be appropriate.

9 THE COURT: Thank you. Mr. Kirchheimer, anything
10 you wanted to add?

11 MR. KIRCHHEIMER: Just briefly, Judge, and it's the
12 same, I would ask that you -- you found him to be a career
13 offender and set -- found the Career Offender Guideline
14 appropriate. I would ask that as a matter of departure or
15 more properly I think these days we're supposed to call it
16 variance, that the conduct here is more properly assessed by
17 the bank robbery guideline. I've calculated in my papers that
18 the bank robbery guideline would be 84 months to 105, given he
19 pled to all three counts, reminding the Court that he pled
20 to -- the government offered him to plead just to the one
21 count, but included an appeal waiver, so he pled to all three
22 counts to preserve his right to appeal. Had he pled to one
23 count that the government demanded of him, these guidelines
24 would have been 63 to 78 months.

25 I would argue that the Court should apply one of

1 those two -- or should vary down to one of those two
2 guidelines. And the reason for that is exactly what we've
3 been talking about for the last six months in this case. That
4 while the law -- the case now is that this bank robbery was,
5 in fact, a violent crime within the terms of the Career
6 Offender Guideline, everyone in this room agrees, I think -- I
7 think I've heard everyone say that they agree -- that this is
8 as non-violent a bank robbery as you can possibly have. The
9 government just said that more or less, in my words not his, I
10 think that's been implicit in what the Court has said. And
11 that even if legally the Career Offender Guideline is
12 appropriate, which again the law of the case now is that it
13 is, that it's just odd to apply the -- the logic of the Career
14 Offender Guideline is entirely appropriate. That if you have
15 a repeated number of violent crimes you ought to get more
16 time. I don't think anybody ever has assailed the logical
17 structure of the sentencing guidelines. However, if the --
18 basically the doubling of the sentence range is based upon the
19 fact that Mr. Love is a violent criminal, I find that hard
20 given the facts of the case. He's a man who walks up to
21 banks, not only these but the state court ones as well as in
22 the past and hands a note and says, in terms of the Woody
23 Allen movie, "this is a gub" -- well, he doesn't even say
24 that, he just says, you know, this is an bank robber. I
25 submitted pictures of his posture, the fact that he's not

1 menacing, that he waited in line to do it.

2 And it is, I think, inappropriate to use the
3 violence enhancement to double his guidelines in such a
4 non-violently committed crime. That's completely separate and
5 apart from, you know, all this -- all the *Beckels* and *Johnson*
6 stuff about whether it is or isn't, and that is agreeing that
7 the structure of the guidelines by having an enhancement for
8 these kind of repeated offenses is perfectly rational. It's
9 just not rational to apply it to someone who is as non-violent
10 as him. That's been my position in all these papers ever
11 since -- since the first set of papers we filed. It's hard
12 now to remember when, I don't remember when those were.

13 I do have to say that I -- just taking my -- when we
14 did the plea allocution in front of the magistrate judge, when
15 we did the plea allocution I had to research the federal law
16 of bank robbery -- before that I hadn't done it in about 16
17 years -- to see if this was enough to -- if handing a note
18 saying this is an bank robber is enough to constitute --
19 legally sufficient to constitute a robbery.

20 And so I'd argue my ignorance as an example of how
21 unusually non-violent this crime was. Again, I -- I,
22 unfortunately, found the federal cases which say a, you know,
23 note bank robbery is enough, so it is, but that's just another
24 example of how incredibly non-violent, non-threatening it was.

25 For those reasons I ask you to impose a sentence at

1 the bottom of one of the two guideline ranges, 84 to 105, or
2 63 to 78. 84 to 105 is what the guidelines would have been if
3 he were not a career offender, but he plead to three
4 robberies, two attempted robberies because of the enhancement
5 for grouping. Or -- which was demanded -- which happened only
6 because we pled to the entire indictment because of the
7 government's insistence on an appeal waiver. And that had he
8 pled to the one robbery only, you know, the price of wanting
9 to do an appeal was -- the guidelines would have been 63 to
10 78. I would ask the Court to impose the bottom of one or the
11 other of those ranges because of the non-violent manner of the
12 commission of this crime.

13 THE COURT: Thank you, Mr. Kirchheimer. Mr. Love,
14 you have a right to make a statement to the Court, is there
15 anything that you would like to say?

16 THE DEFENDANT: No, no, Your Honor.

17 THE COURT: So we've been here for a while, we had a
18 lot of discussion. Like I told you in the beginning, there's
19 a lot that the Court has to consider in determining what
20 sentence to impose. Like I said, we have to start with the
21 guidelines even though they are advisory and not binding on
22 the Court and the Court is always hopeful it gets it right and
23 then that it's made the proper determination and that's the
24 Court's obligation to do that.

25 The Court has to consider whether any departures are

1 appropriate either above the guideline range or below the
2 guideline range. I've considered any of the departures that
3 are contained in the guidelines, again, that are advisory and
4 finds that none are really applicable here, but the Court
5 doesn't stop at that analysis there. The Court has to
6 consider the 3553(a) factors which we mentioned earlier and
7 which your attorney has mentioned as well. And like I
8 mentioned to you before, those factors are essentially goals
9 of sentencing that should be achieved whenever a federal judge
10 imposes sentence and it is in the statute in 18 U.S.C. Section
11 3553(a). That's where it gets its name. And that statute
12 starts with what's called a Parsimony Clause that says that
13 whatever sentence the Court imposes should not be greater than
14 necessary to achieve those goals of sentencing. Some of them
15 apply, some of them don't apply. Applicable here are the
16 nature and circumstances of your offense. A lot has been
17 discussed about that. Your history and characteristics and
18 there is a lot about that in the submissions from your
19 attorney as well as here today.

20 The sentence should reflect the seriousness of the
21 offense, promote respect for the law and provide just
22 punishment for the offense and also afford adequate deterrents
23 to criminal conduct in society as a whole and specifically
24 protect the public from any further crimes that you might
25 commit.

1 It should provide the defendant before the Court
2 with any needed educational or vocational training, medical
3 care or other correctional treatment in the most effective
4 manner. Restitution is mandatory in this case. I believe
5 losses were only sustained by the victim in Count One, and
6 that is mandatory in a case such as this.

7 I'm not going to say anything more about the
8 guidelines. What I will say is that on the one hand you have
9 had a very difficult life, difficult childhood. You've had a
10 life that has been marked by long-term use of drugs and also
11 perhaps some mental health issues as well that perhaps that
12 have not really been adequately addressed. You have spent a
13 substantial part of your life in and out of jail beginning
14 with age 17.

15 With respect to Criminal History Category VI, a
16 person falls in that category if they have at least 13
17 criminal history points or more, and in your case you have 22
18 and that doesn't include eight prior convictions for which no
19 points were assessed, and the Court has to take that into
20 account. Your criminal history starts at the age of 17 with a
21 robbery 3 where you stole someone's earrings, you said you had
22 a gun.

23 And also the fact that while you've been in custody
24 in the state court system you've had a lot of disciplinary
25 action taken against you for a variety of issues including

1 creating disturbances, disobeying direct orders, fighting.
2 You've been arrested for assault while on parole. In fact,
3 you've rarely had any parole time where you weren't violated
4 one way or another. And you do have a history of convictions
5 for violence towards individuals. It seems like mostly women,
6 perhaps the same person, not clear to me from the writeup, but
7 causing injury, violating orders of protection. You've had
8 bench warrants during the life of some of these cases. You
9 violated probation. You've had convictions for contempt of
10 court for violating protection orders.

11 You've had, as we discussed, a number of robbery
12 offenses. You've had some minor offenses for fare beating,
13 drug possession, simple drug possession. In 2002, you had
14 another assault three conviction and also you've made threats
15 to the victim in the past. After that you had another robbery
16 conviction that was a chain snatch, there was injury to the
17 complainant in that case. And you had disciplinary actions
18 against you in the state corrections system including
19 possession of contraband, threats, providing false
20 information. Again, you violated the orders of protection,
21 you absconded from parole. You had yet another criminal
22 contempt conviction for violating a Court order, order of
23 protection. You threatened the victim in writing and telling
24 her that you'd get a gun and kill her.

25 In another attempt robbery conviction in 2009 you

1 threatened the use of a gun and removed property that was a
2 bank robbery. You seem to like Popular Community Bank which
3 was the victim I think twice in this case. And that's the
4 first time that you threatened the use of a firearm in passing
5 a note in a bank robbery.

6 In another case in a robbery 2 conviction you
7 displayed a knife and actually hit the complainant in that
8 case and caused injury.

9 So you have had a number of bank robberies,
10 robberies from individuals, it's -- while, thankfully, there
11 was no violence in this case, you have a history that does
12 seem to indicate that if need be you will resort to violence
13 and the Court has to consider that in terms of protecting the
14 public. You are a serial robber, whether it's influenced by
15 your drug addiction. You've got really no employment history
16 to speak of. You've got no stable home to speak of either.
17 But the Court has serious concerns about the fact that you
18 might recidivate and put the public at risk.

19 By the same token, I do think that the guideline
20 range under the Career Offender Guideline as applied is too
21 onerous a guideline. And I also think that even applying a
22 total offense level of 22, in other words, not using the
23 career offender finding is not adequate either.

24 With respect to the plea of guilty penalty, as it
25 has been called by your attorney, you allocuted under oath

1 that nobody forced you to plead guilty. You understood that
2 the plea of guilty to the indictment was to preserve your
3 ability to appeal in this case, and so that was a conscious
4 decision that you made. And so I can't -- I'm reluctant to
5 apply a so-called penalty here analysis.

6 The Court finds that a sentence of 120 months is
7 appropriate under all of the circumstances, that's on each of
8 the three counts to run concurrent with a three-year term of
9 supervised release on each count also to run concurrent with
10 each other. I would note that probation's recommendation on
11 each count was 188 months, which was the high end of the
12 Career Offender Guideline.

13 Restitution is ordered in the amount of \$300 under
14 Count One. And that's payable at the rate of \$25 per quarter
15 and 10 percent of your gross income while you're on supervised
16 release.

17 The following special conditions of supervision
18 apply: You may not possess any firearm, ammunition or
19 destructive device. You must comply with the restitution
20 order. I know the indictment charged forfeiture, but I don't
21 think the government is seeking forfeiture. Correct?

22 MR. GILMAN: That's correct, Your Honor, we will not
23 seek forfeiture because the amount is -- because of the amount
24 under \$300 and we'll leave it to restitution for that amount
25 to be reclaimed.

1 THE COURT: You must comply with the restitution
2 order of the Court and that means that you must make full
3 financial disclosure to probation in order to determine your
4 ability to pay. Upon request, you must provide to probation
5 all your financial records including any commingling income,
6 expenses, assets and liabilities including any income tax
7 returns with the exception of the financial reports, accounts
8 that you report, I don't think you had any, and noted in the
9 presentence report you're prohibited from maintaining and/or
10 opening any additional individual and/or joint checking,
11 savings or other financial accounts for either personal or
12 business purposes without the knowledge and approval of the
13 Probation Department. You must cooperate with the probation
14 officer in the investigation of any of your financial dealings
15 and provide truthful monthly statements of your income and
16 expenses. You must cooperate in signing of any authorization
17 to release information forms permitting probation to access
18 your financial information and records.

19 You must participate in an out-patient drug
20 treatment program, if appropriate at that time. So, first,
21 there has to be an evaluation and, if appropriate, an
22 out-patient treatment program. You'll have to contribute
23 to -- that's a program that's approved by the Probation
24 Department. You must contribute to the cost of that treatment
25 not to exceed an amount determine reasonable by the Probation

1 Department's sliding scale for substance abuse treatment
2 service and cooperate in securing any applicable third-party
3 payment, that's like insurance or Medicaid. You must disclose
4 all financial information and documents to probation so they
5 can determine your ability to pay.

6 You must not consume any alcohol or any kind of drug
7 or synthetic drugs, nothing, before, during and after
8 treatment unless you're given a prescription by a doctor, a
9 licensed doctor or a psychiatrist and you have to provide
10 proof of that prescription to probation.

11 You must submit to random drug testing during and
12 after treatment to ensure abstinence from drugs and alcohol.
13 Probation had recommended a curfew, but the defendant is
14 essentially homeless, so for the first six months the
15 defendant shall reside in a residential reentry center or a
16 halfway house, or until a suitable home is obtained that's
17 approved by probation.

18 What that means is the first six months you're going
19 to have to be in a halfway house unless you're able to find
20 suitable housing that probation approves of. If you do that
21 let's say within the first two months of being at the halfway
22 house, you can move out of the halfway house into the home as
23 long as probation approves of it.

24 Do you understand that?

25 THE DEFENDANT: Yes.

1 MR. KIRCHHEIMER: Judge, might I suggest since
2 you're basically that condition adds approximately six months
3 to the sentence, that to take account for that six month
4 halfway house, obviously it's eminently rational that you
5 reduce the prison sentence from 120 months to 114 months on
6 the assumption that he's going to have an extra six months on
7 the beginning, on the front end of the supervised release, so
8 make it 114 months plus six months RRC while on supervised
9 release.

10 THE COURT: No, that application is denied.

11 You must maintain lawful verifiable employment
12 and/or participate in some sort of educational program
13 including getting your GED, or vocational program.

14 There is a 300-dollar special assessment. Let me be
15 clear, the GED is a separate condition because for a lot of
16 vocational programs you need have a GED first. A lot of
17 training programs you need to have that first. I'm hopeful
18 that you're going to make productive use of your time while in
19 custody and get your GED while you're inside so that you can
20 have a leg up when you come out. Okay?

21 So that's \$100 per count. No fine is imposed due to
22 the priority of restitution as well as inability to pay.

23 There are no outstanding counts open or indictments,
24 underlying indictments, correct?

25 MR. KIRCHHEIMER: Correct.

1 MR. GILMAN: That's correct, Your Honor.

2 THE COURT: Any recommendation to the Bureau of
3 Prisons? I was going to recommend that he be provided the
4 opportunity to participate in RDAP.

5 MR. KIRCHHEIMER: Yes, Judge, I was going to ask you
6 that.

7 THE COURT: I'm also going to recommend that he be
8 provided with mental health treatment.

9 Would you be amenable to that, Mr. Love?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: I'm going to ask for that as well.

12 What about location of the facility?

13 MR. KIRCHHEIMER: Judge, I'd ask you recommend a
14 facility as near New York State as possible, near New York
15 City, so that would be -- but I don't want --

16 THE COURT: Fort Dix or something like that?

17 MR. KIRCHHEIMER: Fort Dix or Danbury. I don't want
18 to specify a particular one because I don't know about
19 security classification.

20 THE COURT: Yes, I would not specify one in any
21 event. And understand, Mr. Love, that where you are housed
22 depends on a lot of different factors not the least of which
23 is something as simple as availability of space. And like
24 what Mr. Kirchheimer specified, whatever security level you
25 get designated that's entirely up to the Bureau of Prisons.

1 You are advised that you have a right to appeal from
2 the sentence and judgment of the Court. You may be entitled
3 to be represented by counsel on appeal. If you cannot afford
4 counsel you may ask for the Court to provide counsel for you,
5 or if you cannot afford the cost and the fees for the appeal
6 you may ask for leave to proceed by way of poor person relief.
7 And I would ask that Federal Defenders to stay on for that
8 requisite 14-day period --

9 MR. KIRCHHEIMER: Yes, yes, Judge, I will do so.

10 THE COURT: -- to file a notice on his behalf --

11 MR. KIRCHHEIMER: I will do so.

12 THE COURT: -- if that's what he wishes.

13 Is there anything else I may have missed?

14 MR. GILMAN: Nothing further from the government,
15 Your Honor. Thank you.

16 MR. KIRCHHEIMER: No, Judge.

17 THE COURT: One question, I know Mr. Love I think
18 may have mentioned to probation that he was interested in
19 going to Alabama, living in Alabama; is that right?

20 THE DEFENDANT: Yeah, I don't know what my sister's
21 gonna do though.

22 THE COURT: Just so that you know, in the event that
23 a suitable home can be found for you in Alabama, that may not
24 be a problem. That's a request you make through probation and
25 then the supervision can be coordinated with Alabama. I would

1 retain jurisdiction in the event that you violated your
2 supervised release you would come back here, okay, and I would
3 then handle that. Okay?

4 THE DEFENDANT: Yes.

5 THE COURT: Just so that you know looking forward
6 that that is still an option that may be available to you, but
7 it's got to be suitable housing, okay?

8 THE DEFENDANT: Thanks.

9 THE COURT: A suitable arrangement.

10 Thank you.

11 MR. GILMAN: Thank you, Your Honor.

12 (Matter concluded.)

13 * * * * *

14
15 I certify that the foregoing is a correct transcript from the
16 record of proceedings in the above-entitled matter.

17 s/ Georgette K. Betts

May 12, 2017

18 GEORGETTE K. BETTS

DATE